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Subject: Puget Soundkeeper Comments - Naval Station Everett, Naval Base Kitsap, Naval Air Station Whidbey Island
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[Puget Soundkeeper Comments on NPDES MS4 Naval Station Everett, Naval Base Kitsap, Naval Air Station Whidbey Island 11-14-19.pdf](#)

Greetings,

Please see the attached comment letter. We look forward to your responses.

Regards,

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November 14, 2019

[Misha Vakoc](mailto:vakoc.misha@epa.gov) (vakoc.misha@epa.gov)
EPA Region 10, Water Division

*Protecting and
Preserving
Puget Sound*

Re: Comments on draft NPDES MS4 permits for Naval Station Everett, Naval Base Kitsap, and Naval Air Station Whidbey Island

Dear Misha Vakoc:

130 Nickerson Street,
Suite 107
Seattle, WA 98109

This letter provides Puget Soundkeeper Alliance's comments on EPA's draft NPDES permits for municipal separate storm sewer discharges from Naval Station Everett, Naval Base Kitsap, and Naval Air Station Whidbey Island.

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Puget Soundkeeper Alliance (Soundkeeper) is a water quality focused grassroots community organization founded in 1984. Soundkeeper's mission is to protect and preserve the waters of Puget Sound. Representing over 3,000 members, supporters, volunteers and activists, Soundkeeper works to meaningfully decrease pollutants reaching the Sound by actively monitoring Puget Sound water quality, enforcing clean water laws, improving policies and regulations, preventing pollution and cleaning up waterways. Soundkeeper is profoundly concerned with the health of the Puget Sound and surrounding waterways.

Over the past 25 years, Soundkeeper has brought well over 200 legal actions on behalf of impacted communities to improve and enforce clean water laws. Soundkeeper's legal program has a strong track record of success, and has assisted in securing some of the strongest National Pollution Discharge Elimination System (NPDES) permits in the country. The result of this work has been to drive innovation in stormwater and wastewater treatment technology by compelling compliance with standards to protect marine and fresh water ecosystems and human health.

Puget Soundkeeper is a member-based organization and represents the interests of its members, who include residents of Bremerton, Everett and Whidbey Island, and people who use and enjoy waterways impacted by storm sewer discharges from the facilities to be covered by these draft permits.

COMMENTS APPLICABLE TO ALL THREE DRAFT PERMITS

Comment 1

Section 1.3.1 of the three permits begins with a statement concerning a presumption that discharges do not violate water quality standards so long as all permit conditions are abided. This statement is "If the Permittee complies with all the terms and conditions of this Permit, it is presumed that the Permittee is not causing or

contributing to an exceedance above the State of Washington's water quality standards." Soundkeeper objects to this statement as lacking foundation in fact and law.

It is generally acknowledged that discharges from MS4s tend to be highly contaminated with a variety of pollutants at levels likely to cause or contribute to in-stream violations of water quality standards. As described by the draft fact sheets, waters receiving discharges from the three Naval MS4s at issue suffer impairment or contamination issues for pollutants likely to be contained in or affected by MS4 discharges, including sediment, dissolved oxygen, bacteria, temperature, nutrients. It is likely that discharges from the MS4s will contribute to these impairments and water quality issues. The draft permits are based on the implementation of stormwater management programs and best management practices. Soundkeeper is unaware of any information indicating that these controls are likely to maintain a discharge quality ensured not to cause or contribute to violations of Washington State's water quality standards. What factual technical analyses support the presumption asserted by Sections 1.3.1 of the draft permits?

As a legal matter, WAC 173-201A-510(3) addresses implementation of Washington's water quality standards to stormwater pollution. It contains no presumption of compliance with water quality standards when permit terms are abided or when best management practices are implemented. Rather, it specifies that additional best management practices must be applied when a violation of water quality standards occurs despite the implementation of measures required by permit. WAC 173-201A-510(3)(b). Further, best management practices established in permits are to be reviewed and modified to achieve compliance with water quality standards when necessary.

Nothing else in Washington's regulations or statutes authorizes or indicates the propriety of the asserted assumption. Former RCW 90.48.555 did contain a section about a presumption of compliance with water quality standards for industrial stormwater discharges, which may be the original source of the presumption concept, but that statute expired in 2015 and never applied to MS4 discharges. What is the legal basis for the presumption of compliance with water quality standards language?

Comment 2

The draft permits couch prohibitions in vague and unenforceable language. Permit sections 1.3.1, 1.3.2, 1.3.3, and 1.3.4 state that certain discharges "are not authorized" by the permit. Soundkeeper suggests that this language be change to actually "prohibit" such discharges. The effect of this language would be to enhance the effectiveness of the permits by making the "unauthorized" discharges instead violations of the permit, enforceable under 33 U.S.C. § 1365. As written, unauthorized discharges do not constitute permit violations, but are merely "not authorized" by the permits.

33 U.S.C. § 1342(p)(3)(B)(ii) requires that these permits "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." The draft language fails to satisfy this requirement.

Comment 3

The draft permits' provision for implementation of control measures to be developed or implemented during the permit term, section 1.4.3, requires the permittee's SWMP documentation to "describe interim schedules for implementation" of such measures. No deadline for implementation of control measures is specified, meaning that the permittee's implementation schedule can be of any length. This is inadequate regulation and fails to meet the requirement of 33 U.S.C. § 1342(p)(4) that compliance with requirements, including those necessary to implement both the "maximum extent practicable" and AKART technology standards, must be "provided for" "as expeditiously as practicable, but in no event later than 3 years after the issuance" of the MS4 permit, as well as 40 C.F.R. § 122.42(d).¹

Comment 4

The draft permits' section 1.4.5 qualifies the requirement that the permittee provide adequate finances, staff, equipment and other support capabilities to implement permit requirements on non-violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. Soundkeeper is unaware of any Clean Water Act provision allowing exception to compliance with NPDES permit requirements when a permittee has not been allocated or is unable to obtain or deploy necessary resources. Please explain the legal basis for this provision and its consistency with the Clean Water Act.

Comment 5

The draft permits' section 1.4.6 requires permittees to implement required control measures of the permit in all areas newly added or transferred to the MS4 as expeditiously as possible but not later than one year from the addition. This is an appropriate requirement. However, the section continues to authorize phased implementation to allow additional time for controls that cannot be implemented immediately. To ensure the prompt implementation of such controls and compliance with the 33 U.S.C. § 1342(p)(4) and 40 C.F.R. § 122.42(d) three year limit on time for compliance, this provision should limit the time available for such phased implementation to three years or less.

Comment 6

The draft permits' section 1.5.1.2 allows an implementation schedule for equivalent control measures that extends to the permit expiration date, which is five years from permit issuance. To ensure the prompt implementation of such controls and compliance with the 33 U.S.C. § 1342(p)(4) and 40 C.F.R. § 122.42(d) three year limit on time for compliance, this provision should limit the time available for implementation to three years or less.

¹ 40 C.F.R. § 122.42(d) states "The initial permits for discharges composed entirely of storm water issued pursuant to [40 C.F.R. § 122.26(e)] shall require compliance with the conditions of the permit as expeditiously as practicable, but in no event later than three years after the date of issuance of the permit."

Comment 7

Soundkeeper supports the draft permits' section 1.5.2 language that specifically does not stay permit conditions while agencies consider a permittee's request for approval of equivalent documents, plans, or programs. This provision is important to fill the mandate of 33 U.S.C. § 1342(p)(4).

Comment 8

The draft permits' condition 2.3.2.1, listing allowable discharges, should specify that "discharges from emergency firefighting activities" are allowable only during actual emergency firefighting activities, not during cleanup of such activities.

Comment 9

The draft permits' condition 2.3.2.2 identifies categories of non-stormwater discharges that the permittee's illicit discharge detection and elimination program may conditionally allow. Draft condition 2.3.2.2.6 provides that "other non-stormwater discharges," presumably including any non-stormwater discharges, may be conditionally allowed by the permittee into the MS4 so long as such discharges are "in compliance with the requirements of a pollution prevention plan reviewed by the Permittee which addresses control of such discharges." Soundkeeper objects to the breadth of this provision as it implies that the permittee can authorize a point source discharge of pollutants to navigable waters via the permittee's MS4 in violation of the 33 U.S.C. § 1311(a) prohibition. Non-stormwater point source pollutant discharges violate the Clean Water Act unless authorized by an NPDES permit. The draft permits should be wholly consistent with this foundational requirement of the Clean Water Act.

Comment 10

The draft permits' conditions 2.3.3.2.1 and 2.3.3.2.2² concern timing for non-stormwater discharges from stormwater outfalls during dry weather. Screening is required to begin two years from the effective permit date and at least 75% of MS4 outfalls must be screened no later than 180 before the permit expiration. Soundkeeper urges that these requirements be tightened. Screening should begin within a year of permit issuance and 90% of outfalls should be screened by the end of the permit term.

Comment 11

The draft permits' condition 2.3.3.3³ requires characterization of the nature of, and any potential public or environmental threat posed by, illicit discharges. For this, "procedures

² These are the section designations in the Naval Station Everett and Naval Air Station Whidbey Island draft permits. The draft permit for Naval Base Kitsap identifies these same conditions as sections 2.3.4.2.1 and 2.3.4.2.2.

³ The draft permit for Naval Base Kitsap identifies this same condition as section 2.3.4.3.

must address the evaluation of whether the discharge must be immediately contained”
What is the standard to be applied by these procedures and evaluation?

Comment 12

The draft permits’ condition 2.4.4 requires permittees to identify Early Action Projects within one year of the permit’s effective date, but imposes no reporting deadline before that for the fourth annual report. Why is there no requirement for permittees to report their Early Action Project identifications shortly after the one-year deadline?

Comment 13

The draft permits’ section 2.5.2.1 allows a permittee to reduce the frequency of otherwise annual inspections of all permittee owned or operated permanent stormwater facilities used for flow control and treatment, other than catch basins “if maintenance and inspection records support such action.” What does this mean? What is the standard that the records must show it met to allow a reduction in inspection frequency?

Comment 14

The draft permits’ section 2.5.1.2 requires a permittee to perform maintenance when indicated by adopted maintenance standards “within 2 years for maintenance that requires capital construction of less than \$25,000.” This implies that there is no time limit for performance of maintenance involving greater capital construction costs. What is the basis for the \$25,000 capital construction cap? How does this lack of a requirement to implement larger projects needed to meet maintenance standards comport with the 33 U.S.C. § 1342(p)(4) and 40 C.F.R. § 122.42(d) mandate that standards be met within three years of permit issuance? The draft fact sheets’ section discussing this condition state that “[t]he EPA does expect the Permittee to undertake maintenance as expeditiously (sic) in all cases.” EPA’s “expectation” is not enforceable and does not satisfy the mandates of NPDES permitting.

Comment 15

The draft permits’ section 2.5.3 concerning spot check inspection of permanent stormwater facilities should include a maximum time allowable for the permittee’s repair or other appropriate maintenance action to address problems identified by inspection.

Comment 16

The draft permits’ section 2.5.4 requires the permittee to “clean catch basins if inspection indicates cleaning is needed.” What is the standard for whether inspection “indicates cleaning is needed”?

Comment 17

The draft permits' section 2.5.9 requires permittees to develop and implement stormwater pollution prevention plans ("SWPPPs") for areas of industrial activities they own, which are not already regulated under the MSGP, within two years of the permit effective date. This is too lengthy a timeline for this important requirement.

While, at least, this condition requires implementation of non-structural BMPs immediately after SWPPP development, it requires merely a schedule for installation of any necessary structural BMPs to be included in the SWPPP. The permit should include a requirement that structural BMPs needed for implementation of AKART or MEP be implemented within three years of permit issuance to adhere to the three-year compliance deadline of 33 U.S.C. § 1342(p)(4) and 40 C.F.R. § 122.42(d).

Comment 18

The draft permits' section 2.5.10.1 requires permittees to document in annual reports circumstances beyond their control that prevent required maintenance activities from occurring. This condition further states that circumstances beyond the permittees' control "may include but are not limited to denial or delay of necessary funding approvals, and unexpected reallocations of maintenance staff or resources to perform emergency work." This is unacceptable, as the Clean Water Act provides no exception to the mandates for timely implementation of AKART and MEP due to funding shortfalls. This provision is particularly inappropriate in these draft permits because the Navy is the true permittee in each instance and, by this provision, can call its own decisions to deny funding or resources for permit compliance activities "circumstances beyond the Permittee's control." This is legally unsupportable and unworkable as a practical matter.

Comment 19

The draft permits' section 2.5.10.2 appears to contain a typographical error ("document summarize").

Comment 20

The draft permits' section 3.1 requires a permittee to at least once per year "evaluate its compliance with these Permit conditions and report on progress toward achieving the control measures." "Evaluate its compliance with these Permit conditions" is vague in that it is unclear what "evaluate" means and it is unclear which permit conditions are referenced.

Comment 21

The draft permits' section 3.3.5 describes monitoring option 1 requirements for monitoring pollutants of concern. It is unclear what it means that the permittee "shall consider the pollutants of concern" identified in Table 3.3.5. Also, this condition appears to allow cessation of monitoring for a particular pollutant of concern if it is not detected in an

unspecified number of monitoring events. Cessation of monitoring should not be allowed until a statistical analysis contemplating anticipated variations in monitoring results supports a conclusion that the pollution is unlikely to be present in detectable concentrations.

Comment 22

The draft permits' section 4.4.4 concerns annual reporting requirements associated with EPA action on additional BMP requirements in response to notice of violations of water quality standards. It provides that EPA may determine that modification of BMPs or a specific implementation schedule is necessary. However, this section and the following section 4.4.4.1 seem to contemplate modification of permit terms to effect these changes in requirements. It is unclear why EPA's determination that BMPs should be modified or implemented on a specific schedule would require modification of permit terms. Indeed, it would appear that EPA could impose these requirements either on the basis of the permit as written (which provides for EPA to impose additional requirements in response to violation notices) or in an administrative order. The suggestion that permit modification is necessary to allow EPA to make these specifications is confusing.

COMMENTS SPECIFIC TO DRAFT MS4 PERMIT FOR NAVAL STATION
EVERETT

Comment 23

The draft permit asserts that it does not include coverage of discharges from overwater and pier areas of Naval Station Everett, including piers D and E, which are "notable areas where stormwater is not collected and treated by an [oil/water separator]." Draft Fact Sheet at 5. It appears that EPA is omitting these discharges from the permit and considers them not subject to the NPDES permit requirement and the Clean Water Act Section 301(a) discharge prohibition. Soundkeeper contends that discharges from overwater and pier areas of the facility must be covered and appropriately conditioned under the permit if they fall within the definition of Municipal Separate Storm Sewer ("MS4"), provided by 40 CFR 122.26(b)(8).

While the draft fact sheet and other information provided with the draft permit for Naval Station Everett do not adequately describe the piers and overwater areas that are proposed for omission from coverage, it seems very likely that the existence of any stormwater drainage collection or conveyance features on such pier and overwater areas would put them squarely within the MS4 definition. The term, in relevant part, includes "a conveyance or system of conveyances (including ... catch basins, curbs, gutters, ... man-made channels, or storm drains)" that are publicly owned, "designed or used for collecting or conveying stormwater," and that is not a combined sewer or part of a publicly owned treatment works." Any stormwater drainage collection or conveyance features, such as drain holes, scuppers, catch basins, stormwater channels, stormwater berms, or anything else that controls stormwater runoff from these piers and overwater areas would put them within the definition of MS4. Are there any such features on the piers and overwater areas? Why are the piers and overwater areas omitted from the draft permit?

Soundkeeper has been involved in a few matters involving discharges from piers and overwater facilities associated with marine transportation terminal and cruise ship terminal operations. Its concern with these discharges stems not only from the apparent inclusion of these discharges in the MS4 definition, but also from data about the quality of stormwater discharges from facilities of this nature. For instance, lab analysis of grab samples taken in October 2016 from a wharf at the Rainier Petroleum facility at Port of Seattle Pier 15 (NPDES Permit No. WAR002721) showed disconcertingly high concentrations of copper and zinc, up to 181 and 515 ug/L respectively.

Comment 24

Draft permit section 2.5.7 requires enhanced street sweeping in particular locations. It imposes a requirement on Naval Station Everett in its annual reports to “summarize its evaluation of the relative effectiveness of such actions summarizing the removal disposal of collected solids.” This summarization requirement is unclear, and this passage may contain one or more typographical errors.

COMMENTS SPECIFIC TO DRAFT MS4 PERMIT FOR NAVAL BASE KITSAP

Comment 25

The 2013 Liberty Bay Watershed Fecal Coliform Bacterial Total Maximum Daily Load provides no wasteload allocation for MS4 discharges from Naval Base Kitsap. It does provide a WLA for facility discharges authorized under the MSGP and the draft permit seems to contemplate that this WLA extends to MS4 discharges. This is inappropriate as these discharges are distinct. Since the TMDL includes no WLA for the Naval Base Kitsap fecal coliform discharges to the Liberty Bay Watershed, the permit must prohibit such discharges. All NPDES permits must be consistent with the terms of an approved TMDL. *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995); 40 C.F.R. § 122.44(d). “WLAs constitute a type of water quality-based effluent limitation.” 40 C.F.R. § 130.2(h).

The draft fact sheet (p. 12) erroneously asserts that this TMDL assigns WLAs to “Keyport”. While Tables 26 and 27 of the TMDL designate WLAs for “NPDES stormwater permittees” by water body and site location, this cannot include WLA’s for the Naval Base Kitsap because the TMDL nowhere mentions or contemplates this particular discharger or NPDES permit.

Thank you for considering these comments. We look forward to your responses.

Sincerely,

Richard A. Smith
Smith & Lowney, PLLC

Katelyn Kinn
Puget Soundkeeper Alliance